IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 1596 OF 2003

IN

SUIT NO. 799 OF 2003

Shri Dilip R. kale .....**Plffs.**
vs.
Shri M.R. Kale and ors. .....**Defnds.**

C.H. Pursanai for the plffs.

Subhash Dhade for defendant no.2.

Mrs. V.K. Gupta for defendanat nos.1, 3, 7, 9 and 12.

CORAM: S.U. KAMDAR, J.

DATE : 23rd September, 2005.

P.C. :.

1. The present notice of motion is taken out inrespect of the estate of the deceased of namely one Mr. Ramchandra Kale. The said Ramchandra Kale died intestate on 16.9.99. The plaintiffs and the defendants are the legal heirs of the said deceased. It is the case of the plaintiffs that

the said Ramchandra Kale on his death left behind the properties which are set out at Ex.D at page 35 of the plaint.

2. It is further the case of the plaintiff that the defendant no.2 is in possession of the said property and therefore the Receiver and injunction should be granted inrespect thereof. The defendant no.2 has filed an affidavit dated 7.7.2003 and in the said affidavit he has admitted that the property being Item no.2 of Ex.D is a HUF property and he has stated that Court Receiver can be appointed of the said property. The said property is a wholly tenanted property. Accordingly Court Receiver is appointed as Receiver inrespect of Swantantra Bharat Bhuvan Building, R.B.S.K. Bole Road, Dadar(W), Bombay 400 028 and of all the tenements therein. The Court Receiver is directed to attorn the tenants to itself for the purpose of managing the property and collecting the rents. The Receiver is directed to pay all outgoings and taxes inrespect of the aforesaid property.

3. Inso far as the other properties are concerned learned counsel appearing for the defendant no.2 states that the room which is supposed to have been allocated by Housing Board in Shri Saikrupa Sahakari Grih Niraman Sanstha, the said room is not yet available as he is yet to get the said tenement to his name in the records of the MH & AD. Thus neither he is in possession thereof nor the said room is in his name. In any view of the matter the said room do not form part of the estate of the said deceased.

4. In so far as the open plot at Vithoba Holiday Resort at Khopoli being Item no.C of the said schedule is concerned he states that the said property does not belongs to him nor he is in possession and infact the said property belongs to a third party namely Ramdas Nana Kadam. In view of the aforesaid no relief can be granted in respect thereof.

5. In so far as Item no.(e) being one flat in Harijan Girijan Co-operative Housing Society Ltd is

concerned, he states that he does not have any such flat in the said society. No building is constructed and ultimately the society has been wound up. In view thereof no relief can be granted inrespect of the said property also.

6. In so far as item no. (f) being Shop No.5 in Sai Time in Kawaliwadi, Dadar is concerned the said shop also does not belongs to the 2nd defendant and the said premises is infact on tenancy of one Mr. Kashinath Mahadeo Patil and that he is not concerned with the said premises. Thus no relief can be granted inrespect thereof also. All these aforesaid properties excluding the building of Dadar of which Court Receiver is appointed hereinabove they do not stand at any point of time in the name of the deceased. However the plaintiffs contend that the said properties are bought by the defendant no.2 from HUF fund and thus liable to be made available for distribution. However the plaintiff has not been able to produce any evidence in support of the aforesaid

contentions. He has not even shown what were the funds of the said HUF and thus I find that there is merits also in the contention of the plaintiff.

7. In so far as the property at Serial no.10 is concerned being the tenancy rights of the garage no.1 at Vishnu Niwas, Ground Floor, Dadar (W), it is the case of the 2nd defendant that the business carried on from the said premises exclusively belongs to the defendant no.2 and no other persons as legal heirs of the deceased is entitled to the same. It is the further case of the defendant no.2 that during the life time of the deceased itself by an affidavit dated 5.9.83 the defendant has given no objection to transfer of the tenancy in the favour of the defendant no.2. It is further the case that though the tenancy of the said premises originally belongs to the deceased, the business was belonging to the uncle of the defendant no.2 and under the deed of assignment dated 20.5.71 the said business has ben assigned in favour of the 2nd defendant. the defendant no.2 has also produced large number of documents to show that infact much

prior to the death of the deceased and in 1990 the rent receipts were transferred in his favour. He has also produced various other documents such as licenses and permits indicating that the business is being carried out all throughout by the defendant no.2 in his personal capacity and the deceased had further no role to play therein. In the light of the said document I am of the opinion that no tenancy rights were subsisting and/or available an therefore the said garage no.1 do not form part of the society of the said deceased.

8. In so far as Item No.(7) of sub-Clause 7(ii) is concerned being shop No.84, New Parshi Chawl, Bandra Link Road,Dharavi learned counsel has produced rent receipts of the said hutment premises and the same are in the name of his wife and therefore also the said property do not belong to the deceased.

9. Item no.(d) sub-clause 7(ii) being Flat no. 12 at 2nd floor, Ramprasad Co-operative Housing Society Ltd, J.P. Road, Andheri(W), Mumbai-58 is

concerned learned counsel for the 2nd defendant has produced the document which will inter-alia indicate that the said premises were constructed by this society of which the 2nd defendant was himself the member. The 2nd defendant has obtained a loan from the bank and has financed the said flat for the purpose of construction and ultimately it has been allocated to him. There is no document produced by the plaintiff to show that the said flat at any point of time belonged to the deceased or that the funds of the deceased has been utilised in acquisition of the said property.

10. In the light of the aforesaid fact, in my opinion it is not possible to grant any interim orders in the present notice of Motion save and except the appointment of Court Receiver only inrespect of one of the property being Swantantra Bharat Bhuvan as mentioned in para 2 hereinabove. Motion disposed off accordingly. No order as to costs.

sed/-

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